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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PLUS MONEY, INC. and MATTHEW LA MADRID,

Defendants,

THE PREMIUM RETURN FUND LIMITED-LIABILITY LIMITED PARTNERSHIP; THE PREMIUM RETURN FUND II LIMITED-LIABILITY LIMITED PARTNERSHIP; THE PREMIUM RETURN FUND III LIMITED-LIABILITY LIMITED PARTNERSHIP; RETURN FUND, LLC; RETURN FUND II, LLC; RETURN FUND III, LLC; RETURN FUND IV, LLC; RETURN FUND V, LLC; RETURN FUND VI, LLC; PALLADIUM HOLDING COMPANY; and DONALD LOPEZ,

Relief Defendants.

Case No. '08 CV 0764 H NLS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER; ORDERS: (1) FREEZING ASSETS; (2) APPOINTING A TEMPORARY RECEIVER; (3) REQUIRING ACCOUNTINGS; (4) PROHIBITING THE DESTRUCTION OF DOCUMENTS; (5) GRANTING EXPEDITING DISCOVERY; AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND APPOINTMENT OF A PERMANENT RECEIVER

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I. INTRODUCTION

This matter involves an investment adviser fraud perpetrated by defendants Matthew "Beau" La Madrid and Plus Money, Inc. ("Plus Money"), an entity controlled by La Madrid. From May 2004 through the present, Plus Money has acted as the investment adviser to The Premium Return Fund Limited-Liability Limited Partnership, The Premium Return Fund II Limited-Liability Limited Partnership, and The Premium Return Fund III Limited-Liability Limited Partnership, three purported hedge funds (the "Premium Return Funds"). Through at least July 2007, the Premium Return Funds raised approximately $30.6 million from at least 300 investors. La Madrid, a former registered representative of a broker-dealer, told investors that he had a lucrative investment strategy involving the purchase and sale of covered call options. Although Plus Money and La Madrid employed some variation of a covered call-option trading strategy for a period of time, and although Plus Money and La Madrid continued to pay purported monthly profits to Fund investors even after all trading activity had ceased, it is unclear how much profit, if any, Plus Money and La Madrid actually generated from this strategy.

Between September and October 2007, without informing investors, Plus Money and La Madrid wired at least $7.6 million from the Premium Return Funds' brokerage accounts to Vision Quest Investments, a dba La Madrid formed in September 2007. On November 14, 2007, Vision Quest wired $10 million to relief defendant Palladium Holding Company ("Palladium"), an entity controlled by relief defendant Donald Lopez. Soon after receiving these funds, Palladium transferred $5 million to a brokerage account it controlled, and began executing numerous short-sell transactions of Treasury bonds. This rampant trading activity has caused a steady dissipation of the assets in Palladium's brokerage account. As of April 25, 2008, only $2.425 million remained available, and at least $875,000 had been wired from Palladium's brokerage account to its bank account.

To prevent any further dissipation of funds, the Commission has filed this emergency civil injunctive action against Plus Money and La Madrid, alleging as to Plus Money and La Madrid violations of Sections 206(1), (2) and (4) of the Investment Advisers Act of 1940

("Advisers Act"), 15 U.S.C. § 80b-6(1), (2) and (4), and Rule 206(4)-8 thereunder, 17 C.F.R. § 275.206(4)-8, seeking a temporary restraining order, an asset freeze, an accounting, an order prohibiting the destruction of documents, expedited discovery, an order appointing a receiver over the assets of Plus Money, and also seeking from each defendant preliminary and permanent injunctions, disgorgement with prejudgment interest, and a civil penalty, and, as to the relief defendants, disgorgement with prejudgment interest with respect to the proceeds relating to the fraud. In addition, the Commission has named the Premium Return Funds; Return Fund, LLC, Return Fund II, LLC, Return Fund III, LLC, Return Fund IV, LLC, Return Fund V, LLC, and Return Fund VI, LLC (the "Return Funds"); Palladium and Lopez as relief defendants, and seeks an asset freeze against each of them and the appointment of a receiver over the Premium Return Funds and the Return Funds.

II. FACTUAL BACKGROUND

A. THE DEFENDANTS

1. **Plus Money, Inc.** is a Nevada corporation formed in June 2004 based in El Cajon, California. (Declaration of Marc J. Blau ("Blau Dec."), ¶ 4, Exhibit ("Ex") 1). It is not registered as an investment adviser under the Advisers Act. (Blau Dec., ¶ 20). Since June 2004, Plus Money has managed the Premium Return Funds.

2. **Matthew "Beau" La Madrid**, 41, is a resident of Jamul, California. La Madrid is a former registered representative. (Blau Dec., ¶ 20). He is the president and treasurer of Plus Money, Inc. (Blau Dec., Ex. 1). He is not registered as an investment adviser under the Advisers Act. (Blau Dec., ¶ 20). La Madrid controlled Plus Money.

B. THE RELIEF DEFENDANTS

1. **The Premium Return Fund Limited-Liability Limited Partnership** is a Nevada limited partnership formed in August 2004. (Blau Dec., Ex. 2). Its general partner is Plus Money, Inc. (Id.) From November 2004 through July 2007, this partnership raised at least $6.2 million from investors.[1] (Blau Dec., ¶ 9).

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[1] Between June 2004 and May 2006, La Madrid also raised $4.2 million from investors that he then transferred to one of three brokerage accounts held in his name. The funds from

2. **The Premium Return Fund II Limited-Liability Limited Partnership** is a Nevada limited partnership formed in June 2005. (Blau Dec., Ex. 3). Its general partner is Plus Money, Inc. (Id.) Between June 2005 and July 2007, this partnership raised at least $7.5 million from at least 115 investors. (Blau Dec., ¶ 9).

3. **The Premium Return Fund III Limited-Liability Limited Partnership** is a Nevada limited partnership formed in February 2006. (Blau Dec., Ex. 4). Its general partner is Plus Money, Inc. (Id.) Between March 2006 and July 2007, this partnership raised at least $12.7 million from at least 90 investors. (Blau Dec., ¶ 9).

4. **Return Fund, LLC** is a Nevada limited liability company formed in June 2004. (Blau Dec., Ex. 5). Plus Money, Inc. is its managing member. (Id.)

5. **Return Fund II, LLC** is a Nevada limited liability company formed in June 2005. (Blau Dec., Ex. 6). Plus Money, Inc. is its managing member. (Id.)

6. **Return Fund III, LLC** is a Nevada limited liability company formed in February 2006. (Blau Dec., Ex. 7). Plus Money, Inc. is its managing member. (Id.)

7. **Return Fund IV, LLC** is a Nevada limited liability company formed in February 2006. (Blau Dec., Ex. 8). Plus Money, Inc. is its managing member. (Id.)

8. **Return Fund V, LLC** is a Nevada limited liability company formed in February 2006. (Blau Dec., Ex. 9). Plus Money, Inc. is its managing member. (Id.)

9. **Return Fund VI, LLC** is a Nevada limited liability company formed in February 2006. (Blau Dec., Ex. 10). Plus Money, Inc. is its managing member. (Id.)

10. **Palladium Holding Company** ("Palladium") is a Colorado corporation formed by Donald Lopez in October 2002. (Blau Dec., Ex. 12). On November 14, 2007, La Madrid, through a dba, wired $10 million to Palladium. (Blau Dec., ¶ 13(d), Ex. 30).

11. **Donald E. Lopez**, age 58, is a resident of Denver, Colorado. (Blau Dec., ¶ 13(a), Ex. 27). Lopez is the incorporator of Palladium and served or serves as its sole director. (Blau Dec., Ex. 12).

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these accounts were eventually transferred to the Premium Return Funds' brokerage accounts. (Blau Dec., ¶ 9).

C. THE DEFENDANTS' INVESTMENT STRATEGY FOR THE PREMIUM RETURN FUNDS

From May 2004 through at least July 2007, Plus Money and La Madrid raised approximately $30.6 million from at least 300 investors. (Blau Dec., ¶ 9, Ex. 23). La Madrid told investors that he had developed a lucrative investment strategy involving the purchase and sale of covered call options. (Declaration of Harry Ferrari ("Ferrari Dec."), ¶ 3). The defendants did not provide investors with a prospectus or with audited financial statements. (Ferrari Dec., ¶ 4). Investors invested in one of three purported hedge funds (the Premium Return Funds) managed by Plus Money and La Madrid. (Ferrari Dec., ¶¶ 5-8). For his managerial efforts, La Madrid was entitled to take a fee equal to 1% per quarter. (Ferrari Dec., ¶ 3).

Investors were solicited through word of mouth referral (Ferrari Dec., ¶ 3), as well as through an Internet website that touted Plus Money's investment program and La Madrid's financial expertise. (Blau Dec., ¶ 18, Ex. 43). Plus Money's website noted that the defendants "have an exclusive business plan and strategies that have been able to generate a substantial monthly income", and that by implementing their strategy of writing covered calls, the defendants had demonstrated their "ability to provide a sound financial plan and a steady income stream." (Id.)

La Madrid told investors that a minimum of $25,000 was required to invest in Premium Return Fund II, but that a minimum of only $1,000 was required to invest in Premium Return Fund III. (Ferrari Dec., ¶¶ 5, 8). For all of the Premium Return Funds, however, the investment strategy remained the same – the purchase and sale of covered call options – and all investment decisions were to be made solely by La Madrid. (Ferrari Dec., ¶ 3).

Although the rates of return were not guaranteed, La Madrid told investors that the Premium Return Funds routinely paid between 2.5% and 3% per month. (Ferrari Dec., ¶ 3). These payments represented purported returns on investor investments as a result of La Madrid's trading strategy.

La Madrid and Plus Money also e-mailed Premium Return Fund investors a monthly spreadsheet detailing how much each investor had invested, how much each investor had been paid in returns that month, and the current holdings of each of the Funds. (Ferrari Dec., ¶ 13). For example, a spreadsheet that La Madrid e-mailed to investors on August 24, 2007 indicates that, as of that date, the 115 investors in Premium Return Fund II had invested $8,375,000, and had been paid returns totaling $4.5 million, including payments of $206,875 in August 2007 alone. (Ferrari Dec., Ex. 3). A similar spreadsheet created for Premium Return Fund III shows that 190 investors had invested $16.6 million, and had been paid returns totaling $4.26 million as of August 2007. (Ferrari Dec., Ex. 4).

In February 2008, for the first time since its inception, Plus Money failed to make its monthly return payments to Premium Return Fund investors. (Ferrari Dec., ¶ 15). In a series of e-mails, La Madrid attempted to reassure investors as to the safety of their investment. (Ferrari Dec., ¶ 15, Ex. 7). In one such e-mail, La Madrid falsely claimed that the February checks had not been issued due to "ongoing negotiations" associated with a "pending SEC inquiry."[2] (Id., February 13, 2008 e-mail). La Madrid urged investors to "be patient with us as we deal with this unfortunate situation." (Id.) In another e-mail, La Madrid claimed that Plus Money was still "answering questions," and that as soon as "they" (presumably the Commission) were satisfied, Plus Money would send checks to investors. (Id., February 23, 2008 e-mail). In another e-mail, La Madrid claimed that the situation remained the same – "we are assured the situation is finish [sic] and our funds will be release [sic], but each morning we run into yet another delay." (Id., March 5, 2008 e-mail).

D. THE UNDISCLOSED CHANGE IN INVESTMENT STRATEGY AND TRANSFER OF ASSETS TO PALLADIUM

Undisclosed to investors, in the fall of 2007, Plus Money began transferring nearly all of the funds from the Premium Return Funds' brokerage accounts into a bank account controlled by La Madrid. Specifically, between September 14, 2007 and October 9, 2007, Plus Money wired $7.6 million from the Premium Return Funds' brokerage accounts into a bank account held by Vision Quest Investments ("Vision Quest"). (Blau Dec., ¶ 7, Exs. 18-22). Vision Quest is a dba

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[2] The Commission first contacted Plus Money on April 9, 2008 through a voluntary request for information, to which it has not yet responded. (Blau Dec., Ex. 44).

La Madrid created in September 2007. (Blau Dec., ¶ 4, Ex. 11). On November 14, Vision Quest then transferred $10 million to Palladium, the Denver-based entity controlled by relief defendant Lopez. (Blau Dec., ¶ 13(d), Ex. 30).

The transfers by Plus Money to Palladium, via Vision Quest, were not in furtherance of Plus Money's avowed strategy of investing solely in covered call options. Instead, the monies were devoted to an unsuccessful different investment strategy and to self-dealing transactions by Palladium and its principal, Don Lopez.

Upon receipt of the $10 million, Palladium transferred $5 million to its brokerage account. (Blau Dec., ¶ 13(g), Ex. 33). Palladium quickly began dissipating that $5 million by engaging in numerous short-sell transactions involving Treasury bonds. (Blau Dec. ¶ 17(a), (b), Exs. 39-40). As of April 25, 2008, this activity had caused Palladium to lose more than half of the account's value, as the total stood at $2.425 million on that date. (Blau Dec., ¶ 17(d), Ex. 42). Between February and April 2008, Palladium wired $875,000 out of this account and into its bank account. (Blau Dec., ¶ 17(c), Ex. 41). Additionally, since November 2007, Palladium has paid $557,810 in commissions to its brokerage, EKN Financial Services, Inc., for executing the myriad short-sell transactions of the Treasury bonds.[3] (Blau Dec., ¶ 17(d), Ex. 42).

Moreover, within a month of its receipt of the $10 million and the immediate transfer of $5 million to its brokerage account, Palladium had wired $4.5 million of the remaining $5 million to various individuals and entities (Blau Dec., ¶ 14, Ex. 36), including:

- $1.8 million to several real estate title companies (including $800,000 toward the purchase of the real property on which a car dealership owned by Lopez is located) (Blau Dec., ¶ 13(e), Ex. 31);
- $716,000 to Manuel Andrade (Blau Dec., ¶ 13(e), Ex. 31), who the Commission believes is the M. Andrew Andrade who serves as registered agent for Palladium (Blau Dec., ¶ 4(m), Ex. 13);

[3] Given the self-dealing and dissipation of assets by Palladium and Lopez, and to avoid the further dissipation or secreting of the $2.425 million that remains in Palladium's brokerage account, the Commission has not contacted either Palladium or Lopez for more information about the nature of their business.

- $675,000 to Associated Companies (Blau Dec., Ex. 31), which is owned by Lopez (Blau Dec., ¶ 4(o), Ex. 15);
- $95,000 toward the purchase of two automobiles (Blau Dec., Ex. 31);
- $90,000 to Classic and Thoroughbred Motor, Inc. (Blau Dec., Ex. 31), which is owned by Lopez, (Blau Dec., ¶ 4(n), Ex. 14); and
- $500,000 back to La Madrid (Blau Dec., ¶ 13(i), Ex. 34).

Plus Money and La Madrid never disclosed to Premium Return Fund investors that they had changed their investment strategy, that they had transferred Premium Return Fund monies to Palladium, or the extent to which Palladium had dissipated investors' assets. To the contrary, on April 5, 2008, Plus Money and La Madrid e-mailed the Premium Return Fund II investors a spreadsheet showing that investors had earned returns averaging roughly 2.5% per month through January 2008. (Ferrari Dec., Ex. 5). This was false because, as described above, Plus Money and La Madrid had already transferred virtually all assets out of the Premium Return Fund brokerage accounts by October 2007. By November 2007, there was almost no activity in any of these brokerage accounts, and as of April 15, 2008, they contained assets totaling approximately $61,000. (Blau Dec., ¶ 10, Ex. 24).

III. LEGAL ARGUMENT

A. The Court Should Issue A Temporary Restraining Order Prohibiting Defendants From Continuing To Violate The Federal Securities Laws

Section 209(d) of the Advisers Act provides that the Commission may obtain a permanent injunction or temporary restraining order without a bond upon a proper showing. 15 U.S.C. § 80b-9(d); *see SEC v. Wencke*, 622 F.2d 1363, 1375 (9th Cir. 1980) (holding that Commission enforcement actions do not require a bond). To obtain such relief, the Commission must demonstrate: (1) a *prima facie* case that a violation of the securities laws has occurred; and (2) a reasonable likelihood that the violation will be repeated. *See SEC v. United Fin. Group, Inc.*, 474 F.2d 354, 358-59 (9th Cir. 1973); *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 n.2 (11th Cir. 1999).

The Commission appears before this Court "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). The need for temporary relief is of great importance when, as here, the Commission acts to protect the public interest and the investing public. "[W]hen 'the public interest is involved in a proceeding of this nature, [the district court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) (citations omitted).

For this reason, the Commission faces a lower burden than a private litigant does when seeking a temporary restraining order or other pretrial relief. Unlike private litigants, the courts presume irreparable injury in Commission enforcement actions and the Commission does not need to show a balance of equities to establish its need for injunctive relief. *See United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397-98 (9th Cir. 1992) ("[i]n statutory enforcement cases where the government has met the 'probability of success' prong of the preliminary injunction test, we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public"); *SEC v. Unifund SAL*, 910 F.2d 1028, 1037 (2d Cir. 1990). Therefore, once the Commission has met the preliminary injunction test set forth above, a temporary restraining order and injunction should be granted.

The Commission has submitted compelling evidence that the defendants are violating the federal securities laws, and that it is reasonably likely that they will continue to do so unless they are enjoined. It is thus appropriate and necessary for the Court to grant the Commission's *Ex Parte* Application.

B. The Defendants Are Violating The Antifraud Provisions Of The Investment Advisers Act

1. The Defendants Are Investment Advisers

Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11), defines an investment adviser as "any person, who for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." This definition includes a general partner of a hedge fund or investment manager of a limited partnership who manages a fund's investments for compensation. *Abrahamson v. Fleschner*, 568 F.2d 862, 869-870 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

The defendants, although unregistered, can be charged directly for violations of the Advisers Act because they meet the definition of an investment adviser. First, the defendants are in the business of providing investment advice to others. The defendants hold themselves out as financial experts who, according to their website, "have an exclusive business plan and strategies that have been able to generate a substantial monthly income." By implementing their strategy of covered call writing, the defendants claim to have demonstrated "its ability to provide a sound financial plan and a steady income stream." (Blau Dec., Ex. 43; Ferrari Dec., ¶ 3). Premium Return Fund investors sought the defendants out for this very reason – one going so far as to refinance his home and use 401K savings to finance his investment in this purportedly lucrative enterprise. (Ferrari Dec., ¶¶ 6-7, 10). Second, the defendants receive compensation – a fee of 1% per quarter – for the advisory services they render on behalf of the Premium Return Funds. (Ferrari Dec., ¶ 3).

2. The Advisers Act Prohibits Investment Advisers From Defrauding Or Deceiving Their Clients

Section 206(1) of the Advisers Act, 15 U.S.C. § 80b-6(1), prohibits any investment adviser from, directly or indirectly, employing any device, scheme or artifice to defraud any client or prospective client. Section 206(2) of the Advisers Act, 15 U.S.C. § 80b-6(2), prohibits any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client. Scienter is required for a violation of Section 206(1), but not for Section 206(2). *See Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see also SEC v. Capital Gains*, 375 U.S. 180, 184, 191-92 (1963). Under Sections 206(1) and 206(2), investment advisers owe fiduciary duties to their clients or prospective clients. Conduct that violates that duty, or otherwise acts as a fraud or deceit upon clients or prospective clients violates these sections. *SEC v. Moran*, 922 F. Supp. 867, 895-96

(S.D.N.Y. 1996).

Section 206(4) of the Advisers Act, 15 U.S.C. § 80b-6(4), prohibits investment advisers from, by the use of jurisdictional means, engaging in any act, practice, or course of business which is fraudulent, deceptive and manipulative, and authorizes the Commission to adopt rules defining such prohibited conduct. The Commission adopted Rule 206(4)-8, 17 C.F.R. § 275.206(4)-8, which provides that it is an illegal practice for advisers to: (1) make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in a pooled investment vehicle; or (2) otherwise defraud those investors or prospective investors.[4] No showing of scienter is required. *See Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles*, Advisers Act Release No. 2628 (August 3, 2007) ("Adopting Release") at 13. The rule became effective on September 10, 2007.[5]

Section 206 also applies to unregistered investment advisers such as Plus Money and La Madrid. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 n.6 (1979).

3. The Defendants Are Defrauding And Deceiving Fund Investors

Plus Money and La Madrid violated Sections 206(1), (2), and (4), and Rule 206(4)-8 thereunder when they effectively transferred almost all of the remaining investor funds to Palladium but never disclosed this fact to Premium Return Fund investors. Plus Money and La Madrid never told investors that their monies were being transferred to Palladium, or that Palladium was rapidly short-selling Treasury bonds, as opposed to investing in La Madrid's covered call option strategy.

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[4] The rule broadly defines "pooled investment vehicle" as "any investment company as defined in Section 3(a) of the Investment Company Act of 1940 (15 U.S.C. § 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either Section 3(c)(1) or Section 3(c)(7) of that Act (15 U.S.C. § 80a-3(c)(1) or (7))." Plus Money is an unregistered investment company under Section 3(a) of the Investment Company Act because it is "an issuer which is or holds itself out as being engaged primarily...in the business of investing, reinvesting, or trading in securities [.]"

[5] The rule applies to both registered and unregistered advisers. *See* Adopting Release at 7.

The Supreme Court has held that parties have a duty of disclosure to one another when a fiduciary or agency relationship exists, or when circumstances exist such that one party has placed its trust and confidence in the other. *See Chiarella v. United States*, 445 U.S. 222, 232, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980). In the Ninth Circuit, in order to determine whether a party has a duty to disclose, a court must examine: (1) the relationship of the parties, (2) their relative access to information, (3) the benefit that the defendant derives from the relationship, (4) the defendant's awareness that the plaintiff was relying upon the relationship in making his investment decision, and (5) the defendant's activity in initiating the transaction. *Jett v. Sunderman*, 840 F.2d 1487, 1493 (9th Cir. 1988).

Here, such a relationship existed giving rise to a duty to disclose. Investors in the Premium Return Funds entrusted Plus Money to invest funds on their behalf specifically so in order for La Madrid to employ his trading strategy. Indeed, at least for some period after the inception of the Funds, Plus Money appears to have traded in covered calls (Blau Dec., ¶ 9), and its track record of providing consistent monthly returns convinced later investors to invest with La Madrid and Plus Money. As such, a fiduciary relationship existed between the defendants and the investors.

The Premium Return Funds' investors would find it material that their monies were no longer controlled by La Madrid, and that they were no longer being used in a covered call trading strategy. (Ferrari Dec., ¶ 3). Rather than disclosing what actually happened to their money, Plus Money, through La Madrid, lulled investors into a false sense of security, sending them e-mails assuring them that their investments were secure, without disclosing the existence of Palladium or their radically different trading strategy. (Ferrari Dec., ¶ 15, Ex. 7). La Madrid falsely claimed to investors in February 2008 that payments would not be made due to "ongoing negotiations" associated with a purported Commission inquiry. (Id. (February 13, 2008 e-mail).

La Madrid also violated these provisions because he controls Plus Money. As the principal of Plus Money, La Madrid's mental state is imputed to his company. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972); *see also In the Matter of John J. Kenny*, SEC Rel. No. IA-2128, n. 54 (May 14, 2003) (an individual associated with an investment adviser entity "may be charged as a primary violator under Section 206 where the activities of the associated person cause him or her to meet the broad definition of 'investment adviser.'"). La Madrid owns and operates Plus Money, Inc., which is the general partner of all three Premium Return Funds. (Blau Dec., Exs. 1-4). La Madrid was held out as making all of the investment decisions for the Premium Return Funds. (Ferrari Dec., ¶ 3).

C. The Court Should Order The Injunctive Relief Sought By The Commission

1. The Defendants Will Continue To Violate The Federal Securities Laws Unless Enjoined

To obtain injunctive relief, the Commission only needs to show that there is a reasonable likelihood of future violations. *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *SEC v. United Fin. Group*, 474 F.2d at 358-59. Whether a likelihood of future violations exists depends upon the totality of the circumstances. *SEC v. Murphy*, 626 F.2d at 655; *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996). The key factor to be considered is the defendant's past illegal conduct, from which a Court may infer a likelihood of future violations. *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978); *see also United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987). Courts also consider the degree of scienter, the isolated or recurrent nature of the violative conduct, the defendant's recognition of the wrongful nature of the conduct, the likelihood that based on the defendant's occupation future violations may occur, and the sincerity of defendant's assurances, if any, against future violations. *Id.*

Injunctive relief is appropriate and necessary here because the defendants' violations are egregious. Since September 2007, the defendants, without any disclosure to Premium Return Fund investors, have transferred $10 million of investor monies that were to be used solely for a covered call option strategy to La Madrid's dba, then to a third party that used half the amount in an entirely different and phenomenally unsuccessful investment scheme, and used the remainder in numerous transactions marked by self-dealing and an apparent kickback to La Madrid.

That the defendants continue to act as investment advisers to the Premium Return Funds, and that they fail to recognize the wrongful nature of their conduct, is amply demonstrated by the series of false and misleading statements they have made to investors as to why they failed to make the payments due in February, March and April 2008. (Ferrari Dec., ¶ 15, Ex. 7). They lied about a "pending SEC inquiry" in February 2008. (Id.) They made several promised payment dates that have passed without any payment being made. (Id. at ¶ 17). No disclosure has been made of their $10 million transfer to Palladium and the dissipation of those funds. Accordingly, issuance of a temporary restraining order is appropriate.

2. The Court Should Order An Immediate Asset Freeze

An asset freeze may be ordered to ensure that a defendant does not dissipate or secrete his assets pending final judgment and to ensure that victims of the securities fraud are compensated. *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d at 1105-06. To obtain an asset freeze, the Commission need only establish that it is likely to succeed on the merits of its claims. *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998). As discussed above, the defendants have violated the antifraud provisions of the Advisers Act. Specifically, Plus Money and La Madrid transferred at least $7.6 million of investor funds to relief defendant Palladium, which quickly dissipated most of these assets. An asset freeze is necessary to prevent the defendants from spending or secreting any remaining funds that need be available to satisfy a judgment against them and to pay for a receiver. Moreover, an asset freeze will prevent further inequitable distributions to certain investors who have requested to withdraw their funds.

For similar reasons, an asset freeze is necessary to prevent the relief defendants from dissipating funds that might satisfy a judgment against the defendants. A defendant may be joined as a party defendant notwithstanding the fact that it is not alleged to have violated the securities laws, to aid in obtaining relief where the defendant possesses illegally obtained profits but has no legitimate claim to them. *See SEC v. Cavanagh*, 155 F.3d at 136; *SEC v. Colello*, 139 F.3d 674, 676-76 (9th Cir. 1998). A district court can freeze a relief defendant's assets to protect any ill-gotten gains. *See Cavanagh*, 155 F.3d at 136; *SEC v. Heden*, 51 F. Supp. 2d 296, 299 (S.D.N.Y. 1999). Here, the evidence shows that Plus Money and La Madrid have transferred nearly all of the remaining investor funds to Palladium and Lopez. The Court should issue an order freezing the relief defendants' assets (up to the total amount of the improper transfers) and those funds should be subject to disgorgement.

3. **The Court Should Appoint A Temporary Receiver Over Plus Money, The Premium Return Funds, And The Return Funds**

Appointment of a receiver is appropriate to "marshal and preserve [assets] against further misappropriation and dissipation." *SEC v. Wencke*, 622 F.2d at 1372. Factors such as the integrity of management and the likelihood of future misuse of assets are critical in determining whether a receiver should be appointed. *See SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 42 (S.D.N.Y. 1968). Here, a receiver over Plus Money, the Premium Return Funds, and the Return Funds I through VI, is necessary. First, La Madrid has not been truthful to the investors with respect to what has happened to their money. (Ferrari Dec., ¶ 15, Ex. 7). Second, a receiver is needed to ensure that the distribution of client funds is done equitably, orderly, and promptly. This is of particular concern here because there were three different Premium Return Funds, and the terms that each afforded to its investors may differ. Moreover, a receiver is necessary in order to maximize the value of any remaining assets, and to pursue any claims Plus Money, the Premium Return Funds and the Return Funds may have against third parties that may have received investor funds from Palladium and Lopez.

4. **Orders Requiring Accountings, Prohibiting The Destruction Of Documents, And Expediting Discovery Are Necessary And Appropriate**

The Court's broad equitable powers in Commission enforcement actions include the ability to order ancillary relief to require accountings, to prohibit the destruction of documents, and to provide for expedited discovery. *See SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). Given La Madrid's transfers of investor monies among Premium Return Fund accounts and his personal accounts, an accounting is necessary to establish his uses and transfers of funds. An order prohibiting the destruction of documents is necessary in light of the possibility that the defendants will destroy evidence of their violations. This is a particular concern given the fact that the defendants have issued a number of e-mails in 2008 containing false statements (Ferrari Dec., ¶ 15), and may now attempt to destroy documents evidencing their falsity. In addition, the defendants appear to have only recently created an operating agreement (Ferrari Dec., ¶ 16), the preservation of which could be of critical importance. Expedited discovery, which is further authorized by Rules 30, 33 and 34 of the Federal Rules of Civil Procedure, is appropriate here in order to develop additional evidence regarding the defendants' violative conduct, money transfers, and the relationship between the defendants and the relief defendants, and to ensure that any asset freeze is fully implemented. Accordingly, this Court should grant expedited discovery.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Commission's *Ex Parte* Application in its entirety.

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Respectfully submitted,

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